PD-1362-18

IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

DEWEY BARRETT

Petitioner,

v.

THE STATE OF TEXAS

Respondent

On Appeal from the Twelfth Court of Appeals
and the Seventh District Court of Smith County, Texas
Cause Nos. 12-18-00023-CR and 007-1252-17

ORAL ARGUMENT REQUESTED

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TO THE HONORABLE JUSTICES OF THE COURT:

Comes Now, Austin Reeve Jackson, attorney for Dewey Barrett, and files this brief pursuant to the Texas Rules of Appellate Procedure, and would show the Court as follows:

STATEMENT OF THE CASE

Dewey Barrett seeks to appeal his conviction and sentence for the felony offense of assault by strangulation. (I CR 99). After being indicted for this offense in the Seventh District Court of Smith County, Mr. Barrett entered a plea of "not guilty" and proceeded to trial. (*Id*). Ultimately, he was convicted and sentenced to serve a term of sixty years' confinement. (I CR 100). An appeal was taken to the Twelfth Court of Appeals who on 10 October 2018 affirmed that conviction in *Barrett v. State*, No. 12-18-00023-CR (Tex.App.—Tyler 2018). A year later this Court granted PDR on three issues. (I CR Supp. 5).

STATEMENT REGARDING ORAL ARGUMENT

Should the Court decide oral argument is necessary or helpful, Counsel would request the opportunity to be present at, and participate in, oral argument.

ISSUES PRESENTED

On its own motion the Court has granted review on three issues:

I. DID THE COURT OF APPEALS ERR IN HOLDING THAT MISDEMEANOR ASSAULT BY STRIKING IN THE FACE WAS NOT A LESSER INCLUDED OFFENSE OF FAMILY VIOLENCE ASSAULT BY IMPEDING BREATH OR CIRCULATION?

II. DO MULTIPLE PHYSICAL INJURIES INFLICTED IN A SINGLE ATTACK CONSTITUTE SEPARATELY ACTIONABLE CRIMES OF ASSAULT OR ARE THEY PART OF A SINGLE ASSAULT?

III. SHOULD *IRVING v. STATE* BE OVERRULED IN LIGHT OF OTHER DEVELOPMENTS IN OUR CASELAW?

STATEMENT OF FACTS

In April of 2017, an officer with the Tyler Police Department was flagged down and alerted to an ongoing assault and informed that the assailant was hitting the victim "in the face." (VIII RR 11, 12). Upon locating the victim the officer and an EMT who later arrived both observed injuries consistent with being struck in the face. (VIII RR 41-42, 53).

Based on this incident Petitioner, Mr. Dewey Barrett, was indicted for the instant offense of assault—family violence, by strangulation. (I CR 1). Specifically, the indictment read:

> Dewey Barrett did then and there intentionally, knowingly, and recklessly cause bodily injury to Glena Mackey, hereafter styled the complainant, a member of the defendant's family, … by intentionally, knowingly, and recklessly impeding the normal breathing or circulation of the blood of the complainant by applying pressure to the throat or neck of the complainant; ….

(I CR 1).

However, when she testified at trial the victim in this case denied that Mr. Barrett had choked her and instead testified that he had only struck her in the face. (VIII RR 72. 77, 82, 93-95, 187-88). As a result, Mr. Barrett requested that the jury be instructed on the lesser-included offense of misdemeanor assault—family violence. (I CR 76-78, 79-81). This request was denied, and Mr. Barrett was convicted of the charged offense of assault by strangulation. (I CR 99).

On direct appeal, Mr. Barret raised a single issue: the trial court erred by not including the requested lesser included offense in the jury charge. *Barrett v. State*, No. 12-18-00023-CR, 2018 Tex.App.LEXIS 8250

at *2 (Tex.App.—Tyler Oct. 10, 2018). The Twelfth Court overruled this argument, citing the Court's opinion in *Irving v. State*, and held:

> Appellant contends that hitting Mackey in the face is a lesser included offense. However assault by striking Mackey in the face is not established by proof of the same or less than all of the facts required to establish assault by "impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth."

Id. at 4.

The Court has now granted review, on its own motion to consider the three issues raised in this brief.

SUMMARY OF ARGUMENT

In order to prove assault by strangulation, the State must first prove a simple assault causing bodily injury. Thus, simple assault is an element of the greater offense of assault by strangulation. The alleged manner and means of "by impeding breath or circulation," is a restriction that binds only the aggravating factor of strangulation but not the potential manner and means of the underlying assault. Because of this, misdemeanor assault causing bodily injury, by any manner and means supported by the evidence at trial (in this case by striking in the face) is a

lesser included offense of assault by strangulation and the Twelfth Court of Appeals erred by holding otherwise.

This interpretation of misdemeanor assault causing bodily injury as a necessary element of assault by strangulation recognizes the Court's long-held description of assaultive offenses as being "results-oriented offenses." That is, an assault under Section 22.01 of the Penal Code is defined by the number of victims and not the number of injuries a single victim receives and the Court should affirm this well-established understanding.

Finally, proper application of the reasoning behind the first two issues demonstrates why the Court should reverse its prior holding in *Irving v. State*; namely, that because a simple assault causing bodily injury must be proved as a predicate to an assault with an additional aggravating element, and because the broad manner in which the allegation of that simple assault can be alleged and proven means that its existence at trial can be demonstrated by any manner and means supported by the evidence, the Court should hold that simple assault is necessarily a lesser included offense of assault with an alleged aggravating factor.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT MISDEMEANOR ASSAULT BY STRIKING IN THE FACE WAS NOT A LESSER-INCLUDED OFFENSE OF FAMILY VIOLENCE ASSAULT BY IMPEDING BREATH OR CIRCULATION.

Prior to submitting the trial court's charge on guilt / innocence, Appellant timely requested an instruction on the lesser-included offense of misdemeanor assault, a request the trial court denied. (I CR 76-81). After raising that issue on appeal, the Twelfth Court affirmed the trial court's decision. *Barrett v. State*, No. 12-18-00023-CR, 2018 Tex.App.LEXIS 8250 at *1 (Tex.App.—Tyler Oct. 10, 2018). The court did so after holding that although the evidence at trial was clear and uncontested that an assault had occurred, because the showing that Mr. Barrett assaulted the victim by striking her in the face was "not established by proof of the same or less than all of the facts required to establish assault by 'impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth.'" *Id.* at *5 (*citing* TEX. CODE CRIM. PROC. art. 37.09). "Thus, a Class A misdemeanor assault does not qualify

as a lesser included offense of assault-family violence by impeding breath or circulation." *Id*.

In essence, the Court appears to conclude that misdemeanor assault can almost never be a lesser offense of an indictment alleging assault by impeding breath. *Id*. TEX. PEN. CODE § 22.01(a)(1), (b)(2)(A)-(B). This conclusion, however, should be revisited in light of both the controlling law on lesser included offenses and contrasting opinions issued by other intermediate appellate courts.

Standard of Review

When an appellant complains on appeal that he was erroneously denied an instruction on a lesser-included offense the reviewing court first determines whether the appellant was entitled to such an instruction. *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex.Crim.App. 1994). This is done through a two-step analysis. *Hall v. State*, 225 S.W.3d 524, 528 (Tex.Crim.App. 2007); *Feldman v. State*, 71 S.W.3d 738, 750 (Tex.Crim.App. 2002); *Rousseau v. State*, 855 S.W.2d 666, 672-73 (Tex.Crim.App. 1993). The first step is to find whether the elements of the proposed lesser-included offense are "established by proof of the same

or less than all the facts required to establish the commission of the offense charged." TEX. CODE CRIM. PROC. ART. 37.09(1) (Vernon 2007). This is a question of law resolved by comparing the elements of the offense for which the defendant was indicted with the elements of the claimed lesser included. *Hall*, 225 S.W.3d at 535-36. The second step is to review the record for some evidence that would allow the finder of fact to find that, if the defendant is guilty, he is guilty only of the lesser offense. *Id*. at 536; *Salina v. State*, 163 S.W.3d 734, 741 (Tex.Crim.App. 2005); *Moore v. State*, 969 S.W.2d 4, 8 (Tex.Crim.App. 1998).

Misdemeanor Assault Causing Bodily Injury is a Lesser Included Offense of Assault by Impeding Breath

As an introductory point, it is important to keep in mind that there can be no offense of assault by impeding breath unless there is first an assault causing bodily injury. TEX. PEN. CODE § 22.01(a)(1), (b)(2)(A)-(B); TEX. PEN. CODE § 1.07(a)(8) (defining" bodily injury" as "physical pain, illness, or any impairment of physical condition"); *see also Bell v. State*, 566 S.W.3d 398, 403 (Tex.App.—Houston [14th Dist.] 2018, no pet.) (choking meets at least the reckless *mens rea* of assault "because a person would be aware that there is substantial and unjustifiable risk of bodily injury by choking someone"); *York v. State*, 833 S.W.2d 734, 736

(Tex.App.—Fort Worth 1992, no pet.) (choking constitutes "bodily injury"); As the Eighth Court of Appeals has noted, in situations where the evidence falls short of showing some form of choking, it can still "easily" support the elements of misdemeanor assault. *Telepak v. State*, No. 08-16-00104-CR, 2017 Tex.App.LEXIS 9619 at *9 (Tex.App.—El Paso Oct. 12, 2017, no pet.) (not designated for publication). In that case, which presented facts similar to those presently before the Court, the Eight Court wrote that where there was conflicting evidence about whether the victim had actually sustained any injury or contact to their throat, and at trial the appellant conceded that there was physical contact between the two, a lesser included instruction was appropriate. *Id*.

> The jury may have had reservations as to whether the injury impeded [the victim's] breathing, which was a predicate to the felony charge. But merely because the jury believed the State did not prove that particular element does not negate that [the victim] suffered some bodily injury to his neck *or foot*.

Id. (emphasis added).

In fact, the Eight Court is just one of many intermediate courts that have discussed, without concern, misdemeanor assault as a lesser included offense of assault by impeding breath even where that misde-

meanor assault could have been committed by the defendant causing injuries to the victim that were not on the throat. *See, e.g., Bradford v. State*, No. 05-18-00862-CR, 2019 Tex.App.LEXIS 4990 at *2 (Tex.App.—Dallas June 17, 2019, pet. ref'd) (not designated for publication) (defendant charged with assault—impeding breath and convicted of lesser included offense of assault); *Rutledge v. State*, No. 14-17-00290-CR, 2018 Tex.App.LEXIS 5133 at *11-2 (Tex.App.—Houston [14th Dist.] July 10, 2018, pet. ref'd) (not designated for publication) (reviewing sufficiency of evidence to support conviction for lesser included offense of misdemeanor assault where injuries were sustained to throat and stomach); *Robles v. State*, No. 04-16-00434-CR, 2017 Tex.App.LEXIS 4241 at *7-8 (Tex.App.—San Antonio May 10, 2017, no pet.) (not designated for publication) (elements of assault by strangulation are misdemeanor assault plus impending breath or circulation); *Halton v. State*, No. 05-14-00640-CR, 2015 Tex.App.LEXIS 6769 at *9 (Tex.App.—Dallas July 1, 2015, no pet.) (defendant properly charged with "family-violence assault by strangulation and the lesser included offenses of misdemeanor assault, with and without family violence); *Leach v. State*, No. 03-13-00784-CR, 2015 Tex.App.LEXIS 12429 at *17 (Tex.App.—Austin Dec. 9, 2015, no pet.)

(not designated for publication) (misdemeanor assault is a lesser included offense of assault by strangulation); *Harrison v. State*, No. 06-11-00196-CR, 2012 Tex.App.LEXIS 3983 at *4 (Tex.App.—Texarkana May 18, 2012, pet. ref'd) (not designated for publication) (holding that assault causing bodily injury is a lesser included offense of assault by strangulation as all elements required to prove the lesser offense of assault were included in the indictment for the great offense).

The Third Court of Appeals has also recognized that misdemeanor assault is a lesser-included offense of assault by strangulation. *Williams v. State*, 2018, No. 03-18-00267-CR, 2018 Tex.App.LEXIS 5406 at *36 (Tex.App.—Austin July 18, 2018, pet. ref'd) (not designated for publication) (a defendant can be found guilty of assault by strangulation only if the jury first finds all of the elements of the lesser-included assault). As that court explained:

> Under the governing provisions of the Penal Code, an individual commits assault if he "intentionally, knowingly, or recklessly causes bodily injury to another." … In addition, the Penal Code specifies that the offense level for an assault is elevated to that of a third-degree felony "if the offense is committed … by impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth."

Id. at *8. For this reason, the court held in another case, a defendant who was convicted of "choking" his daughter by holding her in a headlock could be acquitted of the charged offense of assault by strangulation and yet convicted of the lesser-included offense of misdemeanor assault for causing injury to her by wrapping his arm around her throat despite the seeming conflict in those two conclusions. *Felder v. State*, No. 03-13-00707-CR, 2014 Tex.App.LEXIS 13616 at *11 (Tex.App.—Austin Dec. 19, 2014, no pet.) (not designated for publication); *see also Guzman v. State*, 552 S.W.3d 936, 942 (Tex.App.—Houston [14th Dist.] 2018, pet. ref'd) (same).

What this language makes clear, and what these other courts have recognized, is that in order to prove assault by strangulation, the State must necessarily prove a simple assault. TEX. PEN. CODE § 22.01(b)(2)(B). Strangulation is effectively an additional, aggravating element. *Id*. Or, as this Court has held, the strangulation element is aimed solely at what type of injury results from a defendant's assaultive conduct. *Price v. State*, 457 S.W.3d 437, 443 (Tex.Crim.App. 2015).

> [T]he offense defined by sections 22.01(a)(1) and (b)(2)(B) has three parts, two of which include culpable mental states: (1) the accused "intentionally, knowingly, or recklessly causes bodily injury to another"; (2) the victim was a person described in certain sections of the Family Code; and (3) the offense was committed by "intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth.

Id. at 442.

The Sixth Court of Appeals has applied similar logic when reviewing an indictment almost identical to the one currently before the Court. *Harrison*, 2012 Tex.App. LEXIS at *17. That indictment, and this one, both read:

1. The defendant intentionally, knowingly, or recklessly;

2. Caused bodily injury;

3. To a family member;

4. By strangulation of the throat or neck.

Id.; (I CR 1). The court noted that "both bodily injury and occlusion are statutory elements of assault (family violence) by occlusion" and that an indictment written in this way "modifies the statutory elements of assault (family violence) by occlusion by restricting itself" to occlusion by applying pressure to the throat or neck. *Id*. at *18. "The allegations in

the indictment did not modify any of the essential elements of assault" and, therefore, simply assault family violence could be a lesser-included offense. *Id*. In other words, impeding breath or blood applies on to the aggravated element and not the underlying element of simple assault and, consequently, limits the manner and means of only the strangulation element. *Id*. Or, referring again to the *Felder* and *Guzman* opinions, this is how you can this is how you can have an assault by choking under 22.01(a) that is, nonetheless, not an assault by strangulation under 22.01(b)(2)(B). *Felder*, 2014 Tex.App.LEXIS *11; *Guzman*, 552 S.W.3d at 942; *see also Ortiz v. State*, No. 04-18-00430-CR, 2019 Tex.App.LEXIS 8221 at *10 (Tex.App.—San Antonio Sep. 11, 2019, pet. granted) (not designated for publication).

The reasoning employed by the Fourteenth Court of Appeals on a related issue of a defendant who claimed his right to notice of the charge made against him was violated when the State tried him for assault strangulation but then asked for a lesser included instruction on assault family violence is instructive. *Guzman*, 552 S.W.3d at 947. In that context the court recognized first that "assault family violence is a lesser included offense of assault family violence by strangulation." *Id*. As a

result, the court reasoned, a defendant charged with assault by strangulation has notice that he could face at trial the lesser charge of assault family violence as the elements of that lesser offense "can be deduced from the facts alleged in the indictment." *Id*. (*citing Salazar v. State*, 284 S.W.3d 874, 878 (Tex.Crim.App. 2009). "Thus, notice of an indicted offense for assault family violence by strangulation constitutes notice of the lesser included offense of assault family violence." *Id*. at 948.

For the same reason, the Court should hold that simple assault causing bodily injury is a lesser included offense of assault by strangulation. As discussed more fully under the third point of error, when a case is indicted as an assault by strangulation, the State is on notice that it has to prove a simple assault occurred and a defendant is on notice that he must be prepared to defend against that element of the offense. *Id*. The inquiry is not whether a misdemeanor assault occurred that resulted in injury to the throat or that was done by a choking-like act on the part of the defendant. The issue is simply that there was an assault causing bodily injury under 22.01(a); *but see, e.g., Amaro v. State*, No. 08-14-00052-CR, 2016 Tex.App.LEXIS 6269 at *25 (Tex.App.—El Paso June 14, 2016, no pet.) (not designated for publication) (holding that while simple

assault is a lesser included of assault by strangulation, the lesser is only assault by injury in the same manner and means alleged in support of the choking element).

As the Fourth Court has recently explained in another case with PDR now pending before the Court, a defendant is entitled to receive a lesser instruction on misdemeanor assault in these cases where there is evidence of any injury – not just one caused to the throat or by choking. *Ortiz*, 2019 Tex.App.LEXIS at *10 (holding that the jury could disbelieve the evidence relating to choking and believe that injury was sustained to the victim's arms, shoulders, writs, or knees); *see also Hardeman v. State*, 556 S.W.3d 916, 923 (Tex.App.—Eastland 2018, pet. ref'd) (holding that evidence was sufficient to support submission of a lesser assault charge where the jury could have believed that injury was caused not by choking but by grabbing the bottom or collar of the victim's shirt).

The same reasoning applies here. The indictment by which Mr. Barrett was charged alleged five elements:

1. Mr. Barrett;
2. Intentionally, knowingly, or recklessly;
3. Caused bodily injury to the victim;

4. The victim was a family member;

5. The offense was committed by intentionally, knowingly, or recklessly applying pressure to the person' throat or neck or by blocking the persons' nose or mouth.

(I CR 1).

This indictment, as the courts in the previously referenced cases recognize, establishes all of the elements of a Class A assault causing bodily injury: Mr. Barrett intentionally, knowingly, or recklessly caused bodily injury to the victim. TEX. PEN. CODE § 22.01(a). That the assault being caused by Mr. Barrett striking the victim was not pleaded is irrelevant – that there is some evidence that, if believed, could support that conclusion is what matters. (VIII RR 72, 77, 82, 93, 94, 95, 187-88, 189); *Hardeman*, 556 S.W.3d at 923. This Court should adopt that conclusion, affirm the reasoning employed by the lower courts that have already done so, and, as a result, reverse the judgment of the Twelfth Court of Appeals in this case and remand the case to that court for consideration of the second prong of the lesser included instruction inquiry.

II. MULTIPLE PHYSICAL INJURIES INFLICTED IN A SINGLE ATTACK DO NOT CONSTITUTE SEPARATELY ACTIONABLE CRIMES OF ASSAULT BUT ARE PART OF A SINGLE ASSAULT.

The Fifth Amendment to the United States Constitution, which prohibits multiple punishments for the same offense in a single prosecution, is a helpful context within which to consider the second issue before the Court. U.S. CONST. amend. V; *Stevenson v. State*, 499 S.W.3d 842, 850 (Tex.Crim.App. 2016). "The threshold question … is whether the defendant is being punished or prosecuted for the 'same offense.'" *State v. Perez*, 947 S.W.2d 268, 270 (Tex.Crim.App. 1997) (*citing United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993).

In determining whether multiple incidents of conduct constitute the same offense, the court looks to a "units analysis" when, as here, the potential offenses are codified in a single statutory provision. *Stevenson*, 499 S.W.3d at 850; *Ex parte Benson*, 459 S.W.3d 67, 71 (Tex.Crim.App. 2015); *see also Harris v. State*, 359 S.W.3d 625, 629 (Tex.Crim.App. 2011) ("In determining whether a particular course of conduct involves one or more distinct offense under a single statute, we must ascertain the 'allowable unit of prosecution' under the statute."). Applying this analysis to assaultive offenses, this Court has on multiple occasions held that the

allowable unit of prosecution is each victim. *Ex parte Castillo*, 469 S.W.3d 165, 172 (Tex.Crim.App. 2015); *Garfias v. State*, 424 S.W.3d 54, 60 (Tex.Crim.App. 2014); *Shelby v. State*, 448 S.W.3d 431, 439 (Tex.Crim.App. 2014); *Ex parte Hawkins*, 6 S.W.3d 554, 560 (Tex.Crim.App. 1999). If revisiting the issue here, the Court should affirm these prior holdings.[1]

Holding that each injury inflicted in a single attack would not only upend the Court's established jurisprudence, but it also would change our very understanding of the nature of assaultive offenses. Historically, courts have understood assault causing bodily injury to be a results oriented offense. *Landrian v. State*, 268 S.W.3d 532, 536 (Tex.Crim.App. 2008). That means that the gravamen of assaultive offenses is to cause bodily injury. *Id.* at 537 ("'What matters is that the conduct (whatever it may be) is done with the required culpability to effect the result the Legislature has specified.'") (*quoting Alvardo v. State*, 704 S.W.2d 36, 39 (Tex.Crim.App. 1985); *see also Cooper v. State*, 430 S.W.3d 426, 429

[1] Although an unpublished opinion and not directly germane to the issue, the detailed analysis of this issue in the context of a double jeopardy claim where a defendant was convicted of both assault and assault by strangulation out of a single incident is helpful. *See Isreal v. State*, No. 03-17-00296-CR, 2018 Tex.App.LEXIS 8760 at *27-35 (Tex.App.—Austin Oct. 26, 2018, pet. ref'd) (not designated for publication).

(Tex.Crim.App. 2014) (the "best indicator of … the unit of prosecution is generally the focus or gravamen of the offense") (Keller, P.J., concurring). More specifically, an assault is causing bodily injury to *an* other person – singular. TEX. PEN. CODE § 22.01(a)(1). As this Court has explained, when the Legislature wrote the Chapter 22 assaultive offense statutes and included language describing an act taken against "another" they did so intending "the offense of assault to be complete with the injury of a single individual." *Phillips v. State*, 787 S.W.2d 391, 395 (Tex.Crim.App. 1990) (discussing assault under TEX. PEN. CODE § 22.02); *see also* TEX. PEN. CODE § 22.01 (employing the same language).

> The wording of [the assaultive statutes] is unambiguous, providing that "a person commits an offense if that person commits an assault against another." Thus, an actor commits a distinct offense against any person he injures and each of those injured constitutes a separate "allowable unit of prosecution."

Id. (*quoting Ex parte Rathmell*, 717 S.W.2d 33, 35 (Tex.Crim.App. 1986)).

If the Court now elects to change this fundamental understanding, the effect will extend beyond simple assault as multiple other result-oriented offenses with comparable statutory langue would be subject to new interpretation and application. For example, the State may be able to argue that a defendant who commits an aggravated kidnapping against

a single individual would now be subject to multiple indictments and punishments for each aggravating factor alleged rather than each victim. *See, e.g., Gonzales v. State*, 270 S.W.3d 282, 288 (Tex.App.—Amarillo 2008, pet. ref'd) (holding, for the same reasons, that the allowable unit of prosecution for an aggravated kidnapping is each victim abducted and not the number of aggravating factors that may be present). Similarly, the absurd situation could arise where a defendant is convicted multiple times of murdering a single individual if the State could prove multiple potential means by which the victim was killed. *See, e.g., Johnson v. State*, 364 S.W.3d 292, 295-96 (Tex.Crim.App. 2012) (discussing that under current law murder is a results-oriented crime and, therefore, what caused the victim's death is not the gravamen of the offense but that the victim did die). Similarly odd, the situation the Court addressed in *Shelby*, where an intoxicated defendant ran his vehicle into a parked police car and was convicted of both aggravated assault and intoxicated assault against the trooper inside the vehicle, would now result in those convictions and sentences standing despite them being for the exact same conduct that produced the exact same injuries to the exact same victim. *Shelby*, 448 S.W.3d at 434, 440.

Certainly, should the Court elect to reverse a prior holding it may do so. But in this instance, there is no way for the Court to hold that individual injuries committed against a single victim in a single incident constitute multiple units of prosecution and still give weight to legislative intent and the clear language the Legislature used in enacting the assaultive statutes. Here, the words of a former Judge of the Court of Criminal Appeals are instructive:

> It is neither the business of the courts nor the prerogative of the judges of the courts to enter the field of legislation, to usurp legislative power, and to enact a law or laws according to their conception of what the law should or should not be.
>
> It is the business of the courts to construe and enforce the law as the legislature has written it and not to write a law, or by the exercise of judicial power, to create a law.

Redding v. State, 316 S.W.2d 724, 733 (Tex.Crim.App. 1958) (Davidson, J., dissenting).

By not responding to the Court's long-held position on this issue, the Legislature has tacitly approved of the Court's application of the law they drafted. *See City of San Antonio v. Tenorio*, 543 S.W.3d 772, 780 (Tex. 2018) (discussing the legislative acceptance doctrine in instances where the legislature has failed to act by amending or otherwise addressing a statute in light of a court's holdings) (*citing Krishnan v. Sepulveda*,

916 S.W.2d 478, 481 (Tex. 1995) ("Such legislative inaction suggests approval of our holdings…."). For this reason, and because a reversal of the Court's prior holdings as the allowable unit of prosecution in an assault would create confusion and a difficult if not impossible structure under which practitioners would have to operate, the Court should affirm that multiple physical injuries inflicted in a single attack do not constitute separately actionable crimes of assault but are part of a single assault.

III. *IRVING v. STATE* SHOULD BE OVERRULED.

In 2005 the Court held in *Irving v. State* that a defendant was not entitled to a lesser included instruction on simple assault where he was charged with aggravated assault. *Irving v. State*, 176 S.W.3d 842, 843, 846 (Tex.Crim.App. 2005). There, the defendant had been charged by an indictment alleging that he had committed aggravated assault against the victim by attacking the victim with a baseball bat and by causing serious bodily injury by hitting the victim with the bat. *Id*. at 845. The requested lesser instruction on simple assault was based on the defendant's "conduct of grabbing the victim and eventually falling on top of her, and not hitting the victim with the baseball bat." *Id*. at 846. The Court concluded:

> Because the conduct constituting the offense of assault for which the Appellant wanted an instruction is not the same as the conduct charged in the indictment for aggravated assault, assault by means of grabbing the victim and eventually falling on top of her is not a lesser-included offense of aggravated assault by striking the victim with a bat. … Assault by grabbing and falling on someone may be a lesser-included offense of aggravated assault in some instances, but not as the greater offense was charged in the indictment int his case.

Id.

The Court should now reverse this decision. The way to best illustrate why is to consider how one might reconcile the Court's holdings that an assault is a results-oriented offense with the conclusion reached in *Irving*. If *Irving* is correct, and, effectively, the defendant's act of grabbing and falling on the victim was a distinct offense, the defendant could now be prosecuted and sentenced for that offense after having been previously convicted and sentenced for the assault with the bat. *Id*. If the facts showed that the defendant hit the victim with the fist of his right hand, then with a bat he held in his left, and then again immediately with his right fist, under *Irving* he has arguably committed three separate offenses. *Id*. However, under both the statues as written and the

majority of the Court's other opinions that touch on this issue, that cannot be the case. *Ex parte Castillo*, 469 S.W.3d at 172; *Garfias*, 424 S.W.3d at 60; *Shelby*, 448 S.W.3d at 439; *Ex parte Hawkins*, 6 S.W.3d at 560.

Consider, at the most basic level, that for the State to prove an allegation for aggravated assault, as in *Irving*, the State must prove that the defendant committed an "assault as defined in § 22.01" of the Penal Code. TEX. PEN. CODE § 22.02(a). The same is also true where the State seeks to prove any other type of enhanced assault under section 22.01 as is in the instant case. TEX. PEN. CODE § 22.01(a)-(c). The plain wording of the statute makes clear that simple, misdemeanor assault under 22.01(a) is an essential element of any of these other offenses. *Id.*; TEX. PEN. CODE § 22.02(a). That is, by the very nature of being charged with assault by strangulation or assault with a deadly weapon, a defendant has been charged with every element of misdemeanor assault. *Id.*

As to concerns regarding the specificity of the charge, a defendant's right to notice of a charge, or whether the manner and means of the lesser-level of assault has been properly alleged, a look to comparable areas of the law reveals that a reversal of *Irving* would not leave assault as an outlier where these issues are concerned. In the context of capital

murder, for example, this Court has noted, "We have repeatedly held that an indictment need not allege the constituent elements of the underlying offense which elevates murder to capital murder." *Alba v. State*, 905 S.W.2d 581, 585 (Tex.Crim.App. 1995); *see, e.g., Kitchens v. State*, 279 S.W.3d 733, 736 (Tex.App.—Amarillo 2007, pet. ref'd) (holding that in a capital murder case charging the defendant with murder in the course of burglary, "the specific theory of burglary need not be alleged in a capital murder incitement based upon the aggravating offense of burglary."). The same is true for offense of engaging in organized criminal activity under Section 71.02 of the Penal Code. There, courts have recognized that the indictment need not allege specific manner and means by which the defendant committed the underlying predicate offense. S*ee Jarnigan v. State*, 57 S.W.3d 76, 92 (Tex.App.—Houston [14th Dist.] 2001, pet. ref'd); *State v. Rivera*, 42 S.W.3d 323, 329 (Tex.App.—El Paso 2001, pet. ref'd); *Crum v. State*, 946 S.W.2d 349, 359 (Tex.App.—Houston [14th Dist.] 1997, pet. ref'd).

In the same way, because simple assault under Section 22.01 serves as a predicate offense to aggravated assault or assault with an aggravating factor such as strangulation, and because an allegation that such an

assault of any manner and means when coupled with an aggravating factor sufficient to establish the grater offense, the Court should reverse its holding in *Irving* that whether simple assault is a lesser included offense is a manner and means or pleading question and, instead, hold that, in accordance with the Court's long-held position that assault is a results-oriented offense with a single unit of allowable prosecution defined by an individual victim, that simple assault is, necessarily, a lesser included offense of aggravated assault.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, counsel respectfully prays that because the Twelfth Court of Appeals erred in concluding that assault causing bodily injury by striking, though supported by the evidence at trial, was not a lesser included offense of assault by strangulation as indicted, the Court should reverse the lower court's judgment and remand the case for further review of the second prong of the lesser included offense and any resulting harm.

Additionally, the Court should affirm its existing jurisprudence that multiple physical injuries inflicted in a single attack constitute part of a single assault.

Finally, because *Irving v. State* is incompatible with other developments in the Court's caselaw, it should be explicitly overruled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Brief was delivered to counsel for the State by efile on 2 January 2020.

/s/ Austin Reeve Jackson

CERTIFICATE OF COMPLIANCE

I certify that this document complies with the requirements of Rule 9.4 and consists of 5,643 words.

/s/ Austin Reeve Jackson